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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICH WILEY et al., Plaintiffs and Appellants, v. YIHUA INTERNATIONAL GROUP, Defendant and Respondent.	D053053 (Super. Ct. No. GIC878714)

APPEAL from a judgment of the Superior Court of San Diego County, Michael M. Anello, Judge. Affirmed.

Plaintiffs and appellants Richard and Yvonne Wiley appeal from a summary judgment entered in favor of defendant and respondent Yihua International Group (Yihua), on plaintiffs' first amended complaint for breach of express warranty stemming from their purchase of "closeout" hardwood flooring from Yihua through a third party retailer. The trial court entered summary judgment on grounds Yihua had presented

evidence that the retailer was not its agent and plaintiffs did not raise a triable issue of material fact as to whether the retailer was Yihua's agent who could bind Yihua by reviving a disclaimed warranty.

Plaintiffs contend the court erred in so ruling because (1) Yihua is independently liable to them for breach of express warranty under California Uniform Commercial Code[1] section 2313; (2) Yihua made the retailer its special agent under Civil Code section 2323 by permitting the retailer to sell its products; (3) Yihua's arguments pertaining to agency were raised for the first time in a footnote in its reply papers; and (4) plaintiffs raised triable issues of material fact as to whether the retailer was Yihua's ostensible agent. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a summary judgment, we view all of the evidence and draw all inferences from that evidence in the light most favorable to plaintiffs, the parties opposing summary judgment. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843 (*Aguilar*); *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.)

In March 2006, plaintiffs purchased 1,400 square feet of "Elegance" engineered hardwood flooring from Deco USA Flooring and Affordable Flooring and Countertops. Deco USA is a fictitious business name of David Abdala. Abdala had purchased the

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1 Undesignated statutory references are to the California Uniform Commercial Code.

flooring from Yihua. The invoice from Yihua to Abdala states: "* * *CLOSE-OUT ITEM. SOLD AS IS – NO WARRANTY."[2]

At the time of the sale between plaintiffs and Abdala, Abdala informed them that the flooring came with a warranty from Yihua, and that Yihua was changing the finish on the flooring so that it was being sold as a "closeout" item. Abdala told plaintiffs the change in finish would in no way diminish or void Yihua's warranty. When plaintiffs received the materials, each box contained a multi-page document entitled, "Installation, Floor Care and Warranty Information," including a page entitled "Limited Warranty." In part, the warranty reads: "Structural Warranty: [¶] Elegance Wood Flooring hereby warrants to the original buyer, the goods to be free from manufacturing defects for a lifetime against warping, buckling, or bonding failure under normal residential use. [¶] Finish Warranty: [¶] The Elegance Wood Flooring [*sic*] hereby warrants to the original buyer the finish against wear through, separation or peeling for 10 years on Acrylic

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2 Plaintiffs purport to "dispute" this fact ("undisputed material fact No. 4") in their opposing separate statement. However, in so doing, they rewrote the "fact" to read: "The invoice [between Yihua and Abdala] provided no warranty coverage with regard to the flooring sold by Abdala." Yihua's moving separate statement phrased undisputed material fact No. 4 as: "The invoice pertaining to the flooring at issue contained the phrase: "* * * CLOSE-OUT ITEM. SOLD AS IS – NO WARRANTY." Plaintiffs' modification of Yihua's separate statement violates California Rules of Court, rule 3.1350(f) pertaining to the contents of an opposing separate statement, which states in part: "Each material fact claimed by the moving party to be undisputed *must be set out verbatim* on the left side of the page, below which must be set out the evidence said by the moving party to establish that fact, complete with the moving party's references to exhibits." (Italics added.) In any event, plaintiffs presented no evidence disputing the fact Yihua's invoice to Abdala contained the "closeout/as-is" statement.

Urethane finished flooring and 25 years on Aluminum Oxide finished products under normal residential use."

Plaintiffs had the flooring installed using the instructions provided with the product. Thereafter, the flooring delaminated and separated or began to separate. When they approached Yihua, they were told the product was a closeout item and came without a warranty.

In January 2007, plaintiffs sued Abdala, Yihua and another individual for breach of contract and the implied covenant of good faith and fair dealing, negligence, breach of warranties and fraud. Following Yihua's demurrers, plaintiffs amended their complaint and were ultimately left with a single cause of action against Yihua for breach of express warranty. Although Abdala initially produced documents in response to discovery, he later failed to participate in the action and threatened bankruptcy.

Yihua thereafter moved for summary judgment on grounds it had sold the subject flooring to Abdala "as is," and had disclaimed all warranties. It argued that in connection with the purchase from Abdala, plaintiffs had acknowledged the flooring was not protected by any warranty when Richard Wiley signed a single-page "refund policy" document stating that once the product was installed there was no warranty.[3] Yihua submitted a declaration from its Vice President, Jean Tong, who averred that because the

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3 In full, that document reads (capitals omitted): "Ref: Elegance Exotic Wood Flooring [¶] 30 day return policy: ok to inspect delivered product and return for refund, if product is not to customer satisfaction. Once wood is installed, there is no warranty." The document has a "customer signature" line, below which appears an illegible handwritten signature.

flooring at issue was closeout, it was sold at a substantial discount and "as is" without any warranty coverage; that Yihua disclaimed all warranties, express and implied. It also submitted the declaration of its attorney, who attached discovery responses and the refund policy document produced by Abdala.

Plaintiffs opposed the motion, arguing that triable issues of material fact as to the existence of the warranty were created by the following facts: (1) that Yihua knew "the invoice supplied to [plaintiffs] did not disclose a lack of a manufacturer's warranty"; (2) Yihua admitted it was aware Abdala had been the subject of many Better Business Bureau (BBB) complaints but continued to do business with him; (3) Yihua enclosed a warranty in each box of flooring without negating the warranty's validity; and (4) Richard Wiley denied ever signing the refund policy paper and the signature on that paper was a forgery. They submitted Richard Wiley's declaration, in which Wiley stated Abdala told him and his wife that the flooring came with a warranty and denied ever seeing or signing the refund policy document. According to Wiley, Abdala explained at the time of the sale that the "closeout" designation was limited to a change in finish and did not diminish or void Yihua's warranty. They also submitted the declaration of a forensic expert averring that in his preliminary opinion, the signature on the refund policy document was not Richard Wiley's. Plaintiffs submitted a September 28, 2006 letter from Phil Reifinger, Yihua's national sales manager, to plaintiffs' counsel explaining that the flooring was closeout and thus sold without a warranty, acknowledging that Deco USA had BBB complaints against it and did not have the "best" reputation, and offering to help them secure replacement flooring at a substantial discount.

In reply, Yihua objected that plaintiffs' opposing papers were untimely filed and based on erroneous and speculative assertions. On the merits, it argued that having purchased the flooring "as is," Abdala was "powerless to 'revive' the disclaimed warranty through his alleged misrepresentations to Plaintiffs." In a footnote, Yihua pointed out plaintiffs did not present competent summary judgment evidence to establish that Abdala was cloaked with either actual or apparent authority to bind Yihua by his misrepresentations; that Yihua did not sell flooring to the general public but only to independent third party retailers and/or installers (of which there were "literally" hundreds), and it was not involved in any manner in Abdala's sale of the flooring to plaintiffs. Yihua supported those assertions with Reifinger's declaration. Reifinger also averred that he never admitted that he or anyone else at Yihua was aware in March 2006 that Abdala's invoice given to plaintiffs failed to disclose that the flooring was sold "as is" or that complaints had been submitted to the BBB by other customers. He averred that his understanding was based upon information conveyed to Yihua by plaintiffs or their counsel, and he had no personal knowledge as to whether such complaints actually existed.

The trial court tentatively denied Yihua's motion in part on grounds it had not shown Abdala was not an authorized agent of Yihua in selling flooring having a limited and/or finish warranty contained in each box. Following arguments on the matter, the court modified its tentative ruling to grant the motion based on Reifinger's declaration, to which plaintiffs never objected as untimely. It ruled Yihua met its initial burden to show Abdala was not an agent by that declaration, and plaintiffs did not submit evidence

raising a material issue of fact showing Abdala was Yihua's agent who could somehow bind Yihua by reviving a disclaimed warranty.

Following entry of judgment in Yihua's favor, plaintiffs unsuccessfully moved for a new trial. This appeal followed.

DISCUSSION

I. *Summary Judgment Standards*

A party moving for summary judgment bears an overall burden of persuasion that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. (*Aguilar*, *supra*, 25 Cal.4th at p. 845.) A moving defendant has the initial burden of production entailing it to "present[] . . . 'evidence' " (*id*. at p. 850, citing Evid. Code, § 110) that would support a prima facie showing of the nonexistence of any triable issue of material fact; that " 'one or more elements of' the 'cause of action' in question 'cannot be established' or that 'there is a complete defense' thereto." (*Aguilar*, at p. 850; Code Civ. Proc., § 437c, subd. (p)(2).) A defendant challenging a plaintiff's cause of action may carry its burden by presenting evidence either negating any such element, i.e., "himself prove not [element] X" or by demonstrating plaintiff "does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar*, at pp. 853-854, 855.) A defendant moving for summary judgment on an affirmative defense must persuade the court there is no material fact for a reasonable trier of fact to find as to that defense. (*Id*. at p. 850, fn. 11.)

Once the moving defendant has met its initial burden of production, the burden shifts to the plaintiff to present evidence showing the existence of a triable issue of one or

more material facts. (*Aguilar, supra*, 25 Cal.4th at p. 850; Code Civ. Proc., § 437c, subd. (p)(2).) "However, if the showing by the defendant does not support judgment in his favor, the burden does not shift to the plaintiff and the motion must be denied without regard to the plaintiff's showing." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534; see also *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223, 1228.)

With these burdens in mind, we independently assess the correctness of the trial court's ruling, applying the same legal standard that governs the trial court. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404.) We construe Yihua's evidence strictly and plaintiffs' evidence liberally, and resolve any doubts as to the propriety of granting the motion in favor of plaintiffs as the opposing parties. (*DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 675.)

II. *Liability Under California Commercial Code Section 2313*

Plaintiffs contend that in granting summary judgment, the trial court erred by failing to recognize that Yihua has "independent" liability to them as a matter of law by providing its own express warranties in every box of flooring supplied to them.[4] They argue Yihua's "guarantee" in its limited warranty that "the goods to be free from manufacturing defects for a lifetime against warping, [etc]. . . ." is an "affirmation of fact

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4 These arguments are misplaced to the extent they focus on the trial court's rationale. The trial court's reasoning is irrelevant as our role on appeal is to review the parties' summary judgment papers de novo. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 457-458.)

or promise relating to the goods sold" within the meaning of section 2313, subdivision (1)(a), creating liability independent of any representation by Abdala, and that the affirmation was a basis of their bargain. They further assert the undisputed evidence shows the warranties were breached when the flooring failed almost immediately.

In response, Yihua points out there is no dispute it sold the product to *Abdala* on an "as is" basis, not to plaintiffs. It argues plaintiffs cannot establish the required elements of a breach of warranty claim under section 2313 because it did not make any affirmation of fact to plaintiffs as a "seller," and its statements did not become "part of the basis of the bargain" as required by the statute because plaintiffs did not receive the materials until after the sale.

Section 2313 provides in part: "Express warranties by the seller are created as follows: [¶] (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. [¶] (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the good shall conform to the description. [¶] . . . [¶] (2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty . . . ."

Thus, under section 2313, an express warranty is made when a seller of consumer goods makes an affirmation of fact or description about a product to a buyer, and the statement becomes "part of the basis of the bargain." (§ 2313, subd. (1)(a), (b); see *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 (*Hauter*) ["The key [to the existence of an

express warranty] is that the seller's statements — whether fact or opinion — must become 'part of the basis of the bargain' "]; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22-23 (*Keith*).) In *Hauter*, the court explained that the basis of the bargain rule changed warranty law so that it no longer required proof that the plaintiff relied upon specific promises made by the seller, but commentators disagreed about whether the change shifted the burden of proving non-reliance to the seller or entirely removed the reliance element from express warranty claims. (*Hauter*, 14 Cal.3d at pp. 115-116.) *Hauter* did not resolve the issue. (*Id.* at pp. 116-117.)

In *Keith*, *supra*, 173 Cal.App.3d 13, the court relied on *Hauter* and official comments to section 2313 to conclude that the burden-shifting interpretation was the proper one. (*Keith*, at pp. 22-23.) Official comment 3 to section 2131 states: "In actual practice[,] affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue is normally one of fact." (See *Keith*, *supra*, 173 Cal.App.3d at p. 22; U. Com. Code com. 3 to Cal. U. Com. Code, § 2313, 23A West's Ann. Cal. Comm. Code (2002 ed.) at p. 296.) According to *Keith*, section 2313 "modifies both the degree of reliance and the burden of proof in express warranties under the code. The representation need only be part of the basis of the bargain, or merely a factor or consideration inducing the buyer to enter into the bargain. A warranty statement

made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove

that the resulting bargain does not rest at all on the representation." (*Keith*, 173 Cal.App.3d at p. 23.) " 'If . . . the resulting bargain does not rest at all on the representations of the seller, those representations cannot be considered as becoming any part of the "basis of the bargain" . . . ' " (*Ibid*.) As an example, *Keith* points out that "statements made by a manufacturer or retailer in an advertising brochure which is disseminated to the consuming public in order to induce sales can create express warranties." (*Id*. at p. 22.)

Keith suggests that the basis-of-the-bargain language allows a plaintiff to rely on a presumption of reliance on an express warranty and places the burden on the seller to rebut this presumption by showing that "the resulting bargain [did] not rest at all on the representation[ ]," i.e., the seller's statements were not an inducement for the purchase. (*Keith*, *supra*, 173 Cal.App.3d at pp. 22-23; see also *Hauter*, *supra*, 14 Cal.3d at pp. 115-116.) In *Keith*, the Court of Appeal concluded the defendant boat seller did not overcome that presumption where the plaintiff had presented evidence that before purchasing a sailboat he relied on sales brochures making assertions about the vessel's seaworthiness; the court observed the plaintiff "was aware of the representations regarding seaworthiness by the seller *prior to contracting*." (*Keith*, at pp. 18, 24, italics added.)

Like the *Keith* court, we decline to conclude that a buyer's reliance has no part in the assessment of whether a particular assertion of fact or promise becomes "part of the basis of the bargain." Here, it is undisputed that the sale of the flooring – the bargain –

was between Abdala and plaintiffs. Yihua's summary judgment evidence demonstrates that the only affirmations of fact made "during [the] bargain" (U. Com. Code com. 3, 23 A pt. 1 West's Ann. Cal. Comm. Code, *supra*, foll. § 2313) were not made by Yihua but by Abdala; in his declaration Reifinger states that "Yihua was not involved, in any way, in Abdala's subsequent sale of the flooring to his customer." Further, Reifinger points out Yihua's warranty information was "enclose[d]" within each box of flooring and included instructions for care and installation. According to Reifinger, the warranty language could not be removed from the instructions. Because Yihua's evidence demonstrates the limited warranty document was not an advertisement or label presented to plaintiffs during their negotiations but rather was contained *inside* the product boxes, a reasonable trier of fact could conclude plaintiffs did not see those warranty statements before they entered into the bargain. In our view, Yihua's evidence is sufficient to meet its threshold summary judgment burden to demonstrate that "the resulting bargain [did] not rest at all on [Yihua's] representations. . . ." (*Keith, supra,* 173 Cal.App.3d at p. 23.)

Plaintiffs presented no evidence — and a reasonable trier of fact could not infer from Wiley's declaration — that during their negotiations, Abdala presented them with the limited warranty document, they opened the box and viewed Yihua's limited warranty, or plaintiffs otherwise learned of the terms of the warranty. There is no evidence plaintiffs agreed to purchase the flooring based on *Yihua's* warranty statements, as opposed to Abdala's representation that the flooring "came with a warranty by Yihua." Nevertheless, plaintiffs argue "there is no question" Yihua's warranty became a basis of the bargain since Abdala used the warranty as "one of the selling points" in completing

the sale and it was a "key reason" why they elected to purchase Yihua's flooring. The argument is not persuasive. We reject the notion that, absent a showing of agency (addressed below), a retailer's assertion that a product is covered by a manufacturer's warranty imputes knowledge of the actual warranty terms to the buyer, when there is no evidence the buyer read or reviewed the manufacturer's statements before entering into the transaction.

Though Yihua did not use the term in its summary judgment papers, its arguments sound in privity, which we conclude is an additional ground to uphold summary judgment. In *Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682 (*Burr*), the California Supreme Court held "[t]he general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." (*Id*. at p. 695; see also *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1169 [same, quoting *Burr*]; *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 720 [same, quoting *Burr*]; *All West Electronics, Inc. v. M-B-W, Inc.* (1998) 64 Cal.App.4th 717, 725 [same, quoting *Burr*].) *Burr* observed that courts created exceptions to the privity rule for items such as foodstuffs (*Burr*, at p. 695), and after *Burr*, the exception was extended to drugs and pesticides. (See *Windham at Carmel Mountain Ranch*, at p. 1169 & fn. 7 [observing these exceptions were created by courts before the establishment of the doctrine of strict liability in tort]; *Arnold v. Dow Chemical Co.*, at pp. 720-721; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 956, fn. 1.) *Burr* also recognized that

"[a]nother possible exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity." (*Burr*, 42 Cal.2d at p. 696; see also *Smith v. Gates Rubber Co. Sales Division* (1965) 237 Cal.App.2d 766, 768.)

Since *Burr*, the California Supreme Court has made statements in cases broadly suggesting that courts no longer require privity in express warranty cases. (See *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 14 ["Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required"]; *Hauter*, *supra*, 14 Cal.3d at p. 115, fn. 8 ["The fact that [plaintiff] is not in privity with defendants does not bar recovery. Privity is not required for an action based upon an express warranty"].)[5] However, *Seely* and *Hauter* did not overrule *Burr*, and, unlike the case at hand, both cases involve written warranties similar to advertisements and labels where the plaintiffs

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5 Plaintiffs assert in reply that this court made a similar statement in *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 143-144, when we said, "Privity is generally not required for liability on an *express* warranty because it is deemed fair to impose responsibility on one who makes affirmative claims as to the merits of the product, upon which the remote consumer presumably relies." For that proposition, we cited *Hayman v. Shoemake* (1962) 203 Cal.App.2d 140, a case involving statements made by a manufacturer's agent directly to the cross-complainant purchasers about the quality of certain seed, which "effectuated and constituted" the sale. (*Id*. at pp. 144-146, 153.) The *Hayman* court expressly recognized the need to satisfy a privity requirement to constitute an express warranty. (*Id*. at p. 153.) *Cardinal Health* does not broadly suggest the privity requirement is disposed of in all express warranty cases. In any event, the statement is dicta as we dealt there with a defendant's challenge to the trial court's denial of nonsuit, directed verdict and judgment notwithstanding the verdict based on a jury verdict finding breach of the implied warranty of fitness for a particular purpose. (*Id*. at p. 138.)

saw and relied upon the written statements in purchasing the product at issue. (*Seely*, at p. 13 [plaintiff relied on statements in purchase order when buying a truck]; *Hauter*, at pp. 109, 117 [plaintiff read and relied on defendant's representation on the label of a shipping carton].) The broad language in *Seely* and *Hauter* narrows significantly when read in the context of those facts. Further, as indicated above, several cases decided after *Seely* reflect the continuing validity of *Burr*'s privity requirement. (*Windham at Carmel Mountain Ranch Assn. v. Superior Court*, *supra*, 109 Cal.App.4th at p. 1169; *Arnold v. Dow Chemical Co.*, *supra*, 91 Cal.App.4th at p. 720; *All West Electronics, Inc. v. M-B-W, Inc.*, *supra*, 64 Cal.App.4th at p. 725.) We conclude plaintiffs' asserted "independent liability" theory under section 2313 is defeated by the fact they did not bargain with or directly purchase the products from Yihua, and were not in privity of contract with it.

II. *Triable Issue as to Ostensible Agency*

Plaintiffs contend that triable issues of material fact exist on the question of whether Abdala was Yihua's ostensible agent.

A. *Trial Court's Consideration of Reifinger Declaration*

Preliminarily, we dispose of plaintiffs' threshold argument that the trial court erred by considering only Reifinger's declaration submitted for the first time with Yihua's reply papers. They maintain that because Yihua did not raise the agency issue in its moving papers and failed to include evidence on that matter in its separate statement, they were deprived of any meaningful opportunity to respond to the declaration with their own evidence.

Plaintiffs' recitation of the proceedings is incomplete. In its ruling, the trial court explained that it considered the Reifinger declaration under the authority of *Gafcon v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1426, because plaintiffs did not object to it as being untimely filed with Yihua's reply papers. Accordingly, it ruled plaintiffs' failure to object constituted a waiver. We assess the court's evidentiary ruling for abuse of discretion, which we will find only if plaintiffs demonstrate the ruling exceeds the bounds of reason. (*DiCola v. White Bros. Performance Products, Inc.*, *supra*, 158 Cal.App.4th at p. 679.)

As in *Gafcon* and the authorities on which it relied — *Plenger v. Alza Corp*. (1992) 11 Cal.App.4th 349 and *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077 — plaintiffs did not object to Yihua's submission of Reifinger's declaration in its reply papers or seek a continuance to address the matters addressed therein. (*Gafcon*, *supra*, 98 Cal.App.4th at p. 1426; *Plenger*, at p. 362, fn. 8; *Coy*, at p. 1085, fn 4.) In *Coy*, the court observed that in the absence of any objection to such reply evidence by the nonmoving party, "the general rule requiring that objections be interposed in the trial court precludes any consideration of the argument in this court that the documents . . . were inadmissible because they were not cited in the County's separate statement." (*Coy*, at p. 1085, fn. 4.) Under these circumstances, plaintiffs have not shown the court abused its discretion in considering Reifinger's declaration. (*Ibid*.)

B. *Ostensible Agency*

"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed

by him." (Civ. Code, § 2300; see *Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399.) To justify recovery against Yihua as a principal for the acts of Abdala as an ostensible agent, plaintiffs must show proof of the following requirements: " 'The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis*, at p. 399; Civ. Code, § 2317.) A finding of an agent's ostensible authority must be based on the conduct of the principal, not solely on the agent's conduct. (*Kaplan v. Coldwell Banker Residential Affiliates, Inc*. (1997) 59 Cal.App.4th 741, 747-748 (*Kaplan*).) " 'Liability of the principal for the acts of an ostensible agent rests on the doctrine of "estoppel," the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury.' " (*Ibid*.; see also 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 96, p. 143.)

Plaintiffs argue the following facts create triable issues as to whether Abdala became Yihua's ostensible agent: (1) Abdala informed them the flooring would be ordered through Yihua and that it came with a warranty by Yihua; (2) plaintiffs would not have purchased the flooring without the warranty; (3) plaintiffs' belief in Abdala's authority was generated by the authority Yihua "bestowed" on Abdala to sell its products; (4) Yihua perpetrated plaintiffs' reasonable belief that a warranty existed by including an express warranty in every box of flooring it sent to plaintiffs.

For the proposition that they would not have purchased the flooring without the warranty, plaintiffs cite only to the factual allegations of their first amended complaint. Their reliance on that pleading is not an evidentiary showing for purposes of summary judgment. (Code Civ. Proc., § 437c, subd. (b)(2), (b)(3), (d); see *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7.) Nor does it suffice to point to *Abdala's* statements to show a triable issue of material fact on the question of ostensible agency, because such agency must be based on Yihua's acts or declarations. (*Kaplan*, *supra*, 59 Cal.App.4th at p. 747.) We have already rejected the argument that Abdala's purchase of product from Yihua for resale necessarily creates an agency for purposes of delivering an express warranty, and plaintiffs cite no authority for the proposition that it is reasonable or justifiable for them (or any ordinary person) to rely on that fact to create an ostensible agency.

A closer question is presented by the fact Yihua did not remove the limited warranty document from within the boxes of flooring purchased by Abdala on an "as is" basis and ultimately delivered to plaintiffs. The question at hand is whether Yihua's inclusion of the limited warranty in the boxes caused plaintiffs to believe that Abdala was acting on Yihua's behalf *when Abdala made his warranty assertions*. (See e.g., *Universal Bank v. Lawyers Title Ins. Corp.* (1997) 62 Cal.App.4th 1062, 1065-1066 [Court of Appeal rejected plaintiff's bank's claim that scope of agency of a title insurance company extended beyond sub-escrow matters by certain advertising brochures on grounds there was no evidence that anyone involved in the loan transaction from the bank read the advertising or had it in mind when it was revealed that the defendant was going to be the

title insurance company involved in the transaction].) Here, plaintiffs do not present evidence that they read Yihua's written limited warranty at the time Abdala made his statements at the time of the sale. That evidence does not raise a triable issue of fact as to whether *at the time of the sale*, plaintiffs reasonably believed Abdala to be Yihua's agent.

We acknowledge that the existence or extent of an agency relationship is a question of fact and summary judgment is improper where triable issues of fact exist as to whether there is an agency. (*Universal Bank v. Lawyers Title Ins. Co.*, *supra*, 62 Cal.App.4th at p. 1066, citing *Seneris v. Haas* (1955) 45 Cal.2d 811, 831 & *Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761-763.) Nonetheless, summary judgment is appropriate where, as here, the evidence is undisputed and susceptible of only one inference on this point. (*Universal Bank v. Lawyers Title Ins. Co.*, at p. 1066.)

III. *Abdala as Special Agent*

Plaintiffs contend that Abdala was Yihua's "special agent" under Civil Code section 2297 who was authorized to warrant the quality of Yihua's flooring under Civil Code section 2323.[6] They maintain such an agency relationship is evidenced by Reifinger's declaration that Yihua relies on "literally hundreds of independent retailers" to sell its products, which they characterize as an admission that Yihua "accepted and depended on Abdala" to sell its product, and Abdala in turn "accepted and depended on Yihua" to have a product to sell. Citing *Alvarez v. Felker Mfg. Co.* (1964) 230

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6 Civil Code section 2297 provides: "An agent for a particular act or transaction is called a special agent." Civil Code section 2323, entitled "Sale of personal property; included authority," states: "An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property."

Cal.App.2d 987 (*Alvarez*), plaintiffs argue, "By granting Abdala the authority to sell its personal property . . . to customers . . . Yihua created a special agency relationship with Abdala under Civil Code section 2323" and "conferred on Abdala the authority to warrant the 'quality and quantity of the property.' " Plaintiffs argue as a result of its grant of authority, Yihua was bound to all express warranties made by Abdala.

We disagree. First, Reifinger's declaration, even strictly construed for purposes of assessing summary judgment, does not constitute an admission of an actual agency relationship. Civil Code section 2298 provides that an agency is either actual or ostensible. The party asserting the existence of a principal-agent relationship has the burden of proving it existed, as well as the scope of the authority given to the agent by the principal with respect to the transaction upon which the action is brought. (*California Viking Sprinkler Co. v. Pacific Indemnity Co.* (1963) 213 Cal.App.2d 844, 850.) " ' "The essential characteristics of an agency relationship as laid out in the Restatement are as follows: (1) An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself; (2) an agent is a fiduciary with respect to matters within the scope of the agency; and (3) a principal has the right to control the conduct of the agent with respect to matters entrusted to him." ' " (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, quoting *Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1868-1869 & *Alvarez, supra,* 230 Cal.App.2d at p. 999.)

Reifinger states: "Yihua does not sell flooring direct to the public, but instead only sells its flooring thorough independent retailers and/or installers. Abdala is one of

literally hundreds of independent retailers to whom Yihua sells flooring. As with all of its transactions, Yihua was not involved, in any way, in Abdala's subsequent sale of the flooring to his customer." Reifinger's declaration does not admit or establish any of the essential characteristics of an agency relationship. To the contrary, it demonstrates that after Yihua's sale to Abdala, Yihua had no involvement with Abdala and necessarily did not control his conduct in reselling the product. (*Kaplan*, *supra*, 59 Cal.App.4th at pp. 746-747 [for a true agency relationship, the principal has control over the activities of the agent]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 983 [fact that parties have a preexisting relationship is not sufficient to make one party the agent for the other; agency is proved by evidence that the person for whom the work was performed had the right to control the activities of the alleged agent]; Civ. Code, § 2299 ["An agency is actual when the agent is really employed by the principal"].)

Second, plaintiffs misplace reliance on Civil Code section 2323 for the proposition that Abdala becomes a special agent authorized to provide warranties as a matter of law by virtue of his purchase and distribution of Yihua's products. A buyer who purchases products directly from a manufacturer for resale to third parties does not necessarily become the manufacturer's special agent. (See *Alvarez*, *supra*, 230 Cal.App.2d at p. 1000, citing Rest.2d Agency, § 14J., p. 73.) As Yihua points out, that principle is aptly demonstrated by *Alvarez*, plaintiff's own cited authority. There, the plaintiff sought to prove for purposes of his claims of express warranty and negligence an agency relationship between the exclusive supplier of a product (a blade for a cutting machine) and its manufacturer, the defendant Felker. (*Id*. at p. 993.) Following a jury verdict in

Felker's favor, the plaintiff on appeal made claims of instructional error, including the trial court's failure to instruct the jury on general propositions of agency. (*Id*. at pp. 996, 1001.)

The Court of Appeal in *Alvarez* observed that Civil Code section 2323 applies to one already determined to be an agent: "With respect to express warranties, a principal may be bound by such warranties made by his agent because an agent authorized to sell personal property has the authority to warrant the quality of the property." (*Alvarez, supra,* 230 Cal.App.2d at p. 997, citing Civ. Code, § 2323.) It concluded the plaintiff's evidence did not demonstrate the necessary elements of agency, even though he had demonstrated the supplier was Felker's exclusive distributor, Felker literature was given to the distributor to promote sales of Felker products, Felker acknowledged the manufacturer-distributor relationship in letters and referred purchasers to the distributor for assistance and service of the product, the supplier showed clients how to use the blade, and an accounting of Felker sales was necessary to compute the amount owed to the distributor for sales. (*Id*. at pp. 998-999.) According to the court, the record showed only that the distributor bought goods outright from the manufacturer and then resold them to customers, and the manufacturer did not become legally bound by the contract of sale between the distributor and the ultimate consumer. (*Id*. at p. 999.) Further, the distributor sold products of other competitors and had no duty to promote or sell a certain number of products. (*Ibid*.) These facts were insufficient to show a fiduciary relationship. (*Id*. at pp. 999-1000.) Finally, the court rejected the argument that the evidence demonstrated sufficient control by the manufacturer even though the

manufacturer referred customers to its distributor, because the distributor was "free to decide whether it would deal with the customers referred to it by Felker." (*Id*. at p. 1000.)

The court concluded: "[U]nder the state of the record the only inference that could be drawn as to the relationship between Felker and [the distributor] was that it was one of buyer and seller. The applicable principle is stated in the Restatement as follows: 'One who receives goods from another for resale to a third person is not thereby the other's agent in the transaction: whether he is an agent for this purpose or is himself a buyer depends upon whether the parties agree that his duty is to act primarily for the benefit of the one delivering the goods to him or is to act primarily for his own benefit.' " (*Alvarez, supra,* 230 Cal.App.2d at p. 1000.)

Here, our task is to search for triable issues of fact to determine whether the summary judgment was properly granted. Doing so, we conclude on this record there are no disputed factual issues, and that the sole inference we may draw from the evidence — – even construing Yihua's strictly and plaintiffs' liberally — is that Yihua and Abdala were buyer and seller, not principal and agent. Again, when the essential facts are not in conflict and the evidence is susceptible to a single inference, the agency determination is a matter of law for the court. (*Emery v. Visa Internat. Service Ass'n* (2002) 95 Cal.App.4th 952, 960; *Violette v. Shoup* (1993) 16 Cal.App.4th 611, 619.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McDONALD, Acting P. J.

IRION, J.